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In the Supreme Court of the United States

OCTOBER TERM, 1978

MARTIN HAROLD HODDER, ET AL., PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that, before licensing a nuclear reactor facility, the Nuclear Regulatory Commission was required to analyze in detail the environmental impact of a type of nuclear accident considered extremely unlikely to occur.

1. In May 1973, respondent Florida Power and Light Company applied to the Atomic Energy Commission for permission to construct a nuclear reactor (St. Lucie Unit 2) on the east coast of Florida. Petitioners intervened in the proceeding scheduled to be held before the Commission's Atomic Safety and Licensing Board. After the Commission's technical staff issued its final environmental statement for the reactor, petitioners asserted that the

environmental analysis was deficient because the staff had failed fully to evaluate the consequences of so-called "Class 9" accidents.[1]

In *Long Island Lighting Company (Shoreham Nuclear Power Station)*, 6 A.E.C. 831 (1973), the Commission's Atomic Safety and Licensing Appeal Board considered whether Licensing Boards should provide a detailed analysis of Class 9 accidents in the context of individual licensing proceedings. The Board ruled that NEPA does not require an inquiry into every conceivable adverse environmental effect, but only those that are reasonably foreseeable, and that Class 9 accidents are "*sufficiently remote in probability that the environmental risk is extremely low*." *Id.* at 835 (emphasis in original).[2]

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[1]Pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Commission has classified potential accidents in categories of increasing severity and decreasing likelihood. The most severe (but least likely) accidents are contained in Class 9. See 10 C.F.R. Part 50, proposed Annex to Appendix D, 36 Fed. Reg. 22851 (1971), now a proposed Annex to 10 C.F.R. Part 51, 39 Fed. Reg. 26279 (1974) (Pet. App. 146b-162b). "Class 9" is the generic description of all conceivable accidents that might occur if virtually all safety systems in the reactor assembly should successively fail, resulting in a meltdown of the reactor's fuel core. The Commission guards against Class 9 accidents through its design requirements and inspections. The possibility of Class 9 accidents is discussed in the final environmental statement, but no attempt is made to quantify their effects in the absence of a showing that the particular facility presents a significant danger that a Class 9 accident could occur (Pet. App. 148b-150b).

[2]The *Shoreham* ruling on Class 9 accidents was affirmed by the court of appeals. See *Lloyd Harbor Study Group* v. *NRC*, No. 73-2266 (D.C. Cir. Nov. 9, 1976), vacated on other grounds, 435 U.S. 964 (1978), decision on Class 9 accidents reaffirmed, No. 73-2266 (D.C. Cir. Nov. 29, 1978).

Following the *Shoreham* decision, it has been the Commission's practice to place upon the party proposing an environmental analysis of Class 9 accidents the burden of coming forward with some ground to conclude that there is a reasonable possibility of a Class 9 accident at the particular reactor facility.

Applying the *Shoreham* rule to petitioners' proposal, the Licensing Board found that "there has been no showing of a reasonable possibility of class 9 accident at St. Lucie and therefore an issue relating to a Class 9 accident is denied" (Pet. App. 8b-9b; 8 A.E.C. 117, 125 (1974)).[3] The Appeal Board affirmed the Licensing Board's ruling (Pet. App. 88b; 3 N.R.C. 830, 841 (1976)).

Petitioners subsequently sought review in the United States Court of Appeals for the District of Columbia Circuit. Before that court, petitioners argued that the 1975 publication of a Commission sponsored Reactor Safety Study, analyzing the possibility and consequences of nuclear accidents, had undermined the basis for the Commission's prior practice regarding Class 9 accidents under NEPA. The court of appeals rejected that contention (Pet. App. 4a), relying on its own decisions rendered both before and after the publication of the Reactor Safety Study. The court concluded that "because of the extreme improbability of their occurrence, the NRC need not consider the environmental effects of so-called 'Class 9' accidents" in all licensing proceedings (*ibid.*). The court further noted that the *Shoreham* rule, allocating the burden of coming forward on the Class 9

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[3]Petitioners do not contend that they presented any information or analysis to the Licensing Board that would indicate that Class 9 accidents could reasonably be foreseen at the St. Lucie facility (Pet. 9).

issue to the party seeking an environmental analysis, was a "reasoned and consistent view of the NRC" and was therefore entitled to judicial deference (*ibid.*).

2. The petition does not raise the question whether the Commission properly regulates licensees to prevent Class 9 accidents,[4] or properly analyzes the environmental effect of nuclear accidents that are reasonably foreseeable.[5] The question raised by the petition (pages 2-3) is whether the Commission properly determined that it is unnecessary to analyze the environmental impact of a category of accidents considered unlikely to occur and which petitioners have failed to show might reasonably be anticipated in light of the characteristics of the particular facility.

Petitioners' claims were properly rejected by the court below on the authority of *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551-555 (1978). *Vermont Yankee* reaffirmed that the requirements of NEPA are bounded by concepts of "feasibility" and that " 'remote and speculative possibilities' " need not be treated in the same fashion as events of greater probability (*id.* at 551). The Commission's *Shoreham* rule is fully consistent with the reasoning in *Vermont*

[4]The Commission seeks to protect the public against Class 9 accidents through design and operating requirements, as well as inspections.

[5]Petitioners do not question the adequacy of the Commission's analysis in this proceeding of the environmental impact of nuclear accidents in probability categories 1 through 8 (Pet. 10).

Yankee that proponents of environmental analysis should not make "reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seek[ ] to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.' " *Id.* at 554. Parties seeking an analysis of remote environmental effects must surmount " 'a threshold requirement of materiality' " (*id.* at 553), and must make a showing that is " 'sufficient to require reasonable minds to inquire further' " (*id.* at 554). This petitioners wholly failed to do. Under *Vermont Yankee* and *Shoreham*, it was therefore unnecessary for the Commission to provide a detailed environmental analysis of remotely possible Class 9 accidents.[6]

3. Petitioners' assertion (Pet. 3) that the Commission improperly relied on adjudication to establish its approach to Class 9 accidents, rather than formal rulemaking, is equally meritless.[7] The Commission's proposed Annex to its environmental regulations (see note 1, *supra*), which provides that Class 9 accidents generally need not be analyzed in environmental impact statements, was intended to provide useful "interim guidance"

[6]The Commission's approach to Class 9 accidents under NEPA has been reviewed by the courts of appeals and in each instance approved. See *Lloyd Harbor Study Group* v. *NRC*, *supra*; *Aeschliman* v. *NRC*, 547 F. 2d 622, 632 n.21 (D.C. Cir. 1976), rev'd on other grounds, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*; *Porter County Chapter of the Izaak Walton League* v. *AEC*, 533 F. 2d 1011, 1017-1018 (7th Cir.), cert. denied, 429 U.S. 945 (1976); *Carolina Environmental Study Group* v. *United States*, 510 F. 2d 796, 798-800 (D.C. Cir. 1975); *Ecology Action* v. *AEC*, 492 F. 2d 998, 999, 1002 (2d Cir. 1974).

[7]That contention was not raised in or decided by the court below. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

pending the promulgation of final rules (Pet. App. 146b).[8] Since that time, the Commission has established through adjudicatory decisions that Class 9 accidents need not be analyzed absent a particularized showing that such accidents present a significant environmental threat. See, *e.g.*, *Long Island Lighting Company* (*Shoreham Nuclear Power Station*), *supra*; *Duke Power Company* (*Catawba Nuclear Station*), 4 N.R.C. 397, 415-416 (1976); see also *Offshore Power Systems* (*Floating Nuclear Power Plants*), 8 N.R.C. 194, 212-214 & 210 n.52 (1978).[9]

As this Court has repeatedly held, the decision whether to proceed by adjudication or rule-making is a discretionary decision. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-294 (1974). " 'Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule.' " *Id.* at 293. Rule-making may be postponed until the agency has acquired "sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947). The Commission's reliance on adjudicative precedent pending the promulgation of final rules is fully consistent with that principle.

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[8]The adoption of interim guidelines is authorized by the Administrative Procedure Act, 5 U.S.C. 553(b)(A).

[9]In *Offshore Power*, the Appeal Board confirmed its prior procedure with respect to Class 9 accidents at land based facilities (8 N.R.C. at 212), but decided that that procedure did not apply to floating nuclear power plants—a new type of facility with which the Commission had not had comparable experience (*id.* at 218-220). The *Offshore Power* decision is under review by the Commission at the present time. Petitioners are therefore in error (Pet. 19) in asserting that *Offshore Power* represents a departure from the Commission's prior approach to land based reactor facilities.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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